

What Criminal Law and Procedure Can Learn from Criminology

David A. Harris*, Guest Editor

About fifteen years ago, I began to explore the issue that has since become known as racial profiling: police use of racial or ethnic appearance as one factor among others in deciding which drivers or pedestrians seemed suspicious enough to stop, question, and search. Like others who had worked in the criminal justice system—I had been a criminal defense attorney and (more briefly) had worked in a prosecutor's office before entering the legal academy—I had heard many times that police commonly based traffic stops and searches on racial or ethnic criteria, and had heard countless anecdotes from friends, acquaintances, and clients about this issue. Since there were no statistics kept on any regular basis by law enforcement agencies that might either confirm or deny whether any such pattern actually existed, the public debate over the issue in the early 1990s consisted largely of assertions and counter-assertions—a war of allegations and stories.

On the one hand, members of communities of color contended that police stops while driving—often for minor equipment infractions or trivial moving violations—happened to them with a frequency much greater than either their presence on the road as drivers or their driving behavior seemed to justify. Even more disturbing, they alleged, these stops often came accompanied by requests for consent to search their cars. For their part, police contended either that this was not happening, or that even if blacks and Latinos did experience disproportionate rates of vehicle stops and searches, this activity helped law enforcement catch greater percentages of criminals for their efforts. The debate seemed at a stalemate. There were two sets of narratives—people of color experiencing discriminatory enforcement versus police agencies using a legitimate marker of greater probability of criminal involvement—that competed with each other.

Then came the work of John Lamberth, then of Temple University, in lawsuits in Maryland¹ and New Jersey.² Lamberth used statistical tools to measure the frequency of police stops of white and black drivers, and compared this stop

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¹ Report of Dr. John Lamberth, Plaintiff's Expert at 9, *Wilkins v. Maryland State Police* (D. Md. 1996) (No. MJG-93-468) (on file with author).

² Report of Dr. John Lamberth, Plaintiff's Expert, *Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers /Travelers on the New Jersey Turnpike Between Exits or Interchanges 1 and 3 from the Years 1988 Through 1991*, at 2, *State v. Soto*, 734 A.2d 350, 352–53 (N.J. Super. Ct. L. Div. 1996) (describing Lamberth's report) (on file with author).

information to the presence of each group on the road. His results changed the national conversation. At least in the locations in which he had conducted his measurements, state police were stopping blacks at many times the rate one would expect, given their presence on the road, and the driving behavior of blacks did not account for the difference. This prompted me to make my first foray into the use of the tools of criminology for the purpose of exploring issues of criminal procedure. I proposed that Congress enact legislation that would mandate collection of ten relevant pieces of data, including the race of the driver, on each traffic stop made by any police department receiving federal funds. This suggestion, presented to the yearly meeting of the Congressional Black Caucus and later published in an article in the *Journal of Criminal Law and Criminology*,³ became the basis for the first legislative proposal on the subject at any level of government: the Traffic Stops Statistics Act of 1997,⁴ introduced by Rep. John Conyers.

In subsequent work,⁵ I used simple data-driven arguments to demonstrate that using race or ethnicity in deciding whom to stop, question, and search did not, in fact, boost the effectiveness of police enforcement efforts. In fact, it seemed to push police success rates down instead of lifting them. This downward pressure on what I called “hit rates” seemed counterintuitive, but study after study supported this insight. This result, like Lamberth’s statistics showing that racial profiling was real and measurable, changed the debate again. No longer would the claim that using racial profiling constituted effective police work go unchallenged.

All of this lifted the issue into the first rank of national concerns, to the point that after he won the disputed 2000 election, George W. Bush spoke before a joint session of Congress for the first time and declared that racial profiling is “wrong[,] [and] [w]e must end it [in America].”⁶

For me, my work on the racial profiling issue marked the beginning of my use of criminology in my scholarship and my embrace of the field and its methods as a way to help me understand, explain, and explore questions of criminal procedure. Certainly I was not the first to do this. I simply offer my story as a way of illustrating how one person, looking for ways to break through a rhetorical and legal impasse, found in criminology a new and highly effective approach.

I claim no great expertise in criminology, and I am fully aware that the methods I have used in my work do not approach any great level of sophistication. I am almost entirely self-taught; for almost all of the mistakes I have managed to avoid in my criminology-based work, I owe a great debt to John Lamberth, who

³ David A. Harris, “Driving While Black” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 579–82 (1997).

⁴ 143 CONG. REC. 341 (1997).

⁵ DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 73–90 (2002); see also David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 294–97 (1999).

⁶ 147 CONG. REC. 2280 (2001).

has served as a patient, kind, and learned mentor to me. Nevertheless, the tools of criminology have transformed the way I look at my areas of study and research, and I believe they can do the same for many others.

That thought became the genesis for this special issue of *The Ohio State Journal of Criminal Law*. Given my own experiences, I had always wanted a chance to explore what criminology might do for others laboring in the same area of the law; thus, the theme of this issue, *What Criminal Law and Procedure Can Learn from Criminology*. I am delighted to present the reader with four articles that will discuss the uses that scholars of criminal law and procedure can make of criminology to bring important insights to our field.

The issue begins with a piece by Richard Leo of the University of San Francisco and Jon Gould of George Mason University. Both Professors Leo and Gould have produced first-rank work in criminology. Their article, *Studying Wrongful Convictions: Learning from Social Science*,⁷ illustrates the theme of this special issue perfectly. Professors Leo and Gould begin by observing the upsurge of legal scholarship on wrongful convictions over the past ten years, but they note that very little of this work has reflected collaboration between legal scholars and criminologists. They then show the potential for such collaboration by using the empirical study of wrongful convictions as an example, arguing that the methods of criminology (and social science generally) will allow us to understand the causes of wrongful convictions because of the capacity of these approaches to give us more precise and accurate descriptions of how things happen. According to Leo and Gould, using these techniques will help scholars of criminal law and procedure to attain a clearer understanding of “the causes, characteristics, and consequences”⁸ of wrongful convictions than does the usual narrative approach utilized in legal scholarship.

Professor Eric Miller of Saint Louis University School of Law takes a somewhat different tack. In *Putting the Practice into Theory*,⁹ Professor Miller surveys two views of the criminal procedure universe: the familiar rights-based conception, which centers on the constitutional jurisprudence of the Supreme Court, and a regulatory view of criminal procedure. The latter, he argues, may have much more to do with how criminal procedure actually functions. But more importantly, the Supreme Court often includes assumptions about the regulatory context in which criminal procedure operates. Modern criminal procedure at the Supreme Court level, Miller argues, “rests upon a variety of untested regulatory assumptions about the ways in which the police do and ought to interact with the public.”¹⁰ These assumptions, often fundamental to or even determinative of the

⁷ Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7 (2009).

⁸ *Id.* at 10.

⁹ Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31 (2009).

¹⁰ *Id.* at 33.

outcomes of Supreme Court cases, are nevertheless “fictional, meaning that they lack any basis in descriptive criminology or social science.”¹¹ Professor Miller argues that those of us in the legal academy involved in the study of criminal law and procedure must begin to examine what he calls “the criminological evidence”¹² to see whether and how it strengthens or weakens the Supreme Court’s assumptions.

Professor Erik Luna of Washington and Lee School of Law takes a contrarian approach to the question.¹³ Though criminology offers considerable help to scholars of criminal law and procedure, it has limits. He prefers that criminal law and procedure make greater use of literary and cultural materials. This type of work, Luna says, can inspire the human imagination in ways that law and criminology simply cannot, helping to raise important questions that studies of law and statistics will not reach. Professor Luna uses the “narrative of fear”¹⁴ after the events of September 11, 2001, as an example of a set of legal and cultural events that might have been positively impacted by paying attention to literature, particularly dystopian fiction. This work might have helped to raise important questions of authoritarian abuses by the government that the law did little to stop.

Last, I offer a piece of my own, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*,¹⁵ as an example of how criminology can guide one’s work and help to pose questions that add depth to both the topics explored and to the solutions to problems we discover. In *Hudson v. Michigan*,¹⁶ the Supreme Court came within one vote of discarding the Fourth Amendment exclusionary rule. One reaction to *Hudson* might be that the exclusionary rule would soon disappear, and we should explore what legal regime might, or should, replace it. But an important piece of criminology scholarship that preceded *Hudson* by just two years, co-authored by Professor Gould, caused me to broaden my research questions. Certainly we needed to ask what, if anything, should replace the exclusionary rule should the rule disappear, but we also needed to notice that, should the rule not disappear, it needed major shoring up if it was to continue to function as envisioned. Put another way, the Supreme Court might overturn the rule, but whether it does or not, the rule in its current state is not functioning well as a deterrent to constitutional violations, and so new measures would be needed either way. In the article, I recommend looking to the advances made in the field of police accountability, in which the work has

¹¹ *Id.*

¹² *Id.*

¹³ Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71 (2009).

¹⁴ *Id.*

¹⁵ David Harris, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149 (2009).

¹⁶ *Hudson v. Michigan*, 547 U.S. 586, 586–87 (2006).

been done not by legal scholars but has been completed by criminologists, particularly Professor Emeritus Samuel Walker of the University of Nebraska.¹⁷

I hope the reader will gain as much from studying this issue of the *Journal* as I have from putting it together and working with these wonderful authors. I thank the *Journal* and its guiding force, Joshua Dressler, the Frank R. Strong Professor in Law at The Ohio State University Moritz College of Law, for the opportunity to serve as guest editor. Joshua, one of the greatest pleasures of undertaking this project has been the chance to work with and learn from you.

D. A. H.

¹⁷ See, e.g., SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005); SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990* (1993).

